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Dale L. Larson, Grethe Larson, and Systematic Builders, INC, a Utah Corporation v. Overland Thrift and Loan, a Utah Corporation, Linda D. Milne, and Western Surety Company : Unknown

Utah Court of Appeals

Joseph Bottum; Bottum, J.H. & Associates; Attorney for Plaintiffs.
Jeffrey M. Jones; Michael L. Dowdle; Robert L. Payne; Allen Nelson Hardy & Evans; Joseph T. Dunbeck; Watkiss & Saperstein; Attorneys for Appellees.

FILED

IN THE UTAH COURT OF APPEALS

JUN 27 1991

Court of Appeals
Case No. 900411-CA

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

DALE L. LARSON, GRETHE LARSON, and SYSTEMATIC BUILDERS, INC., a Utah corporation,

Plaintiffs-Appellants,

vs.

OVERLAND THRIFT AND LOAN, a Utah corporation, LINDA D. MILNE and WESTERN SURETY COMPANY,

Defendants-Appellees.

District Court
Case No. C87-3405

BRIEF OF APPELLANTS ON APPLICABILITY OF LMV LEASING INC. v. CONLIN

APPEAL FROM SUMMARY JUDGMENTS
IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

THE HONORABLE SCOTT DANIELS, DISTRICT JUDGE

Joseph Bottum, Esq. (0387)
David W. Brown, Esq. (5671)
J.H. BOTTUM & ASSOCIATES
418 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 538-0700
Attorneys for Plaintiffs-Appellants

Jeffrey M. Jones, Esq. (1741)
Michael L. Dowdle, Esq. (4025)
Robert L. Payne, Esq. (5129)
ALLEN NELSON HARDY & EVANS
215 South State Street #900
Salt Lake City, Utah 84111
Telephone: (801) 531-8400
Attorneys for Appellee Overland Thrift & Loan

Joseph T. Dunbeck (3645)
WATKISS & SAPERSTEIN
310 South Main Street, #1200
Salt Lake City, Utah 84101
Attorney for Appellees Linda D. Milne and Western Surety Company

ARGUMENT PRIORITY CLASSIFICATION: 14(b)

The Court has requested special briefing on the issue of the impact of this Court's decision in LMV Leasing, Inc. v. Conlin, 805 P.2d 189 (Utah App. 1991) on this case vis-a-vis the decision of the Supreme Court of Utah in Colonial Leasing Co. v. Larsen Bros. Const., 731 P.2d 483 (Utah 1986), regarding the issue of lease versus security agreement.

The Court has also requested that Appellants respond to the offer of compromise made by Appellee Overland in oral argument regarding crediting Appellants with one half of the $51,864.90 total from the Trustee's Sale of Appellants' property. In response to the offer of compromise made at this late stage, for the reasons stated herein, Appellants hereby reject said offer.

Addressing the applicability of Conlin, Appellants contend here, as expressed in their reply brief, that it makes no difference whether the lease agreement is construed as a lease or security agreement because Appellee is bound for its recovery on the contractual provision for liquidated damages which reasonably interpreted and construed, establishes a penalty and will not be enforced under familiar rules that are uniformly applied in such circumstances.

The affidavit submitted by Appellee Overland to establish damages, although nicely drawn, was not in conformity with the liquidated damages provision of the lease agreement and was therefore legally inadequate where Appellants did not offer any affidavits in opposition, assuming that Appellee Overland is bound by the contractual provisions of the agreement between the parties.

In Conlin, 805 P.2d at 196, this Court specified those

factors it considers significant. First, the Court stated, "'The prime essential distinction between a lease and a conditional sale is that in a lease the lessee never owns the property.'" That is not the case here in light of the option to purchase contained in the lease agreement. In Conlin, the lease contained no such option to purchase. Second, this Court stated in Conlin that "[t]he agreement specifically provides for retention of title [in the lessor] ..." Id. In the instant action, the lease contains an option to purchase "which is an alternative provision for transfer of ownership." Id. This Court then added that "ownership tax benefits under the lease agreement, another traditional indication that the parties intended to enter into a true lease agreement" were reserved exclusively to the lessor in Conlin. Id. In this action, ownership tax benefits, as indicated by the record, were in favor of the lessee, the Appellants.

Factors such as the option to purchase and the ownership tax benefits, in addition to the numerous factors listed in Colonial Leasing Co., 731 P.2d at 487, which are present in this lease and were enumerated during oral argument, indicate genuine issues of material fact which preclude the entry of summary judgment.

In Colonial Leasing Co., the lower court held that parol evidence was not admissible to change the character of the lease agreement. It is Appellants' understanding of the holding of the Utah Supreme Court in Colonial Leasing Co. that the presence of certain provisions in the putative lease agreement that are commonly associated with and contained in purchase agreements

create ambiguities and the necessity for the admission of extrinsic or parol evidence to clear up. The case was remanded so the trial court could allow parol evidence to clear up the ambiguity that was created by the presence of provisions that are normally associated with purchase agreements. See, Colonial Leasing Co., 731 P.2d at 488.

In the instant action, there is only one conclusion reasonably inferable from the provisions of the documents (the lease agreement and the trust deed), i.e., the transaction is a sale agreement. If, as Appellee Overland contends, the agreement is a true lease, then why the requirement for additional security in the form of the trust deed on Appellants' residence. The security in the form of the trust deed, along with the equipment described in the lease, are labeled as "security" for payment of the installment payments described in the lease.

But then, as previously stated, whether the character of the transaction is determined to be a lease or a sale, the Appellee Overland cannot recover under the liquidated damages provision because that would be a penalty.

For the foregoing reasons, summary judgment is not appropriate in this case, and this Court should reverse the lower court's granting of summary judgment.

DATED this 27th day of June, 1991.

J. H. BOTTUM & ASSOCIATES

David W. Brown

David W. Brown

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing BRIEF OF APPELLANTS ON APPLICABILITY OF LMV LEASING INC. V. CONLIN was mailed, postage prepaid, on this 27th day of June, 1991 to the following:

Jeffrey M. Jones, Esq. (1741)
Michael L. Dowdle, Esq. (4025)
Robert L. Payne, Esq. (5129)
ALLEN NELSON HARDY & EVANS
215 South State Street #900
Salt Lake City, Utah 84111

Joseph T. Dunbeck (3645)
WATKISS & SAPERSTEIN
310 South Main Street, #1200
Salt Lake City, Utah 84101

Kathy Doan

Craig G. Adamson(0024)
Eric P. Lee (4870)
Attorneys for Defendant/Appellant
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101
Telephone: (801) 521-6383

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

---oooOooo---

VIVIAN M. SCHELLER and STEVEN D. TOLLSTRUP,	:	**ADDENDUM TO APPELLANT'S BRIEF**
Plaintiff/Appellee,	:	**Case No. 900392-CA**
v.	:	
DIXIE SIX CORPORATION,	:	**Priority 14(b)**
Defendant/Appellant.	:	

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DATED: May 10, 1991.

Craig G. Adamson
Eric P. Lee
Attorneys for Defendant/Appellant

WALTER P. FABER, JR. (A1026)
Attorney for Plaintiffs
2102 East 3300 South
Salt Lake City, UT 84109
Telephone: 486-5634

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR THE

COUNTY OF SALT LAKE, STATE OF UTAH

VIVIAN M. SCHELLER and STEVEN D. TOLLSTRUP, Plaintiffs,	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	Civil No. 830906862CV
DIXIE SIX CORPORATION, Defendant.	JUDGE LEONARD H. RUSSON

This matter came on for trial on the 21st day of November, 1989, at the hour of 10:00 o'clock a.m. The plaintiffs, Scheller and Tollstrup, were represented by Walter P. Faber, Jr. and Richard M. Matheson. Dixie Six was represented by Craig G. Adamson and John T. Evans.

This matter was remanded to this court by the Utah Court of Appeals for the sole purpose of determining the value of the non-sale efforts of Dixie Six, the general partner, to Scheller and Tollstrup, the limited partners, under a theory of quantum meruit outlined by the Court of Appeals in its decision. The court having reviewed the file, the decision of the Court of Appeals, the evidence submitted and the argument advanced by each of the parties at the trial after remand and being fully informed in the matter, and good cause appearing therefor, now makes and enters the following:

FINDINGS OF FACT

1. Both Dixie Six and Scheller and Tollstrup presented evidence as to the value of the non-sale efforts of Dixie Six.

2. Scheller and Tollstrup's experts testified that the efforts of Dixie Six did not enhance the value of the property, since the purchaser, Busch Development Company, modified the plans and obtained a new conditional use permit and did not utilize the efforts made by Dixie Six. One of Scheller and Tollstrup's experts testified that reasonable effort to obtain a conditional use permit at the time in question would have required 40 hours of time at $75 per hour.

2. Dixie Six presented evidence through its general manager that he spent 10% to 20% of his time over a two and one half year period on the project in question. Dixie Six presented no evidence as to the hourly value of such time.

3. The court finds that the manager of Dixie Six spent 15% of his time during the two and one-half years from 1980 through 1982 in non-sale efforts and that such efforts have a reasonable value of $36,000.00.

Based on the foregoing Findings of Fact, the court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Court of Appeals remanded to this court the sole question whether Dixie Six was entitled to any compensation in quantum meruit for the value, if any, of its non-sale efforts.

2. Accordingly, the court concludes that the reasonable

value of Dixie Six's non-sale efforts in quantum meruit is $36,000.00 and determines that Dixie Six should be awarded that amount and that Scheller and Tollstrup should receive the balance of the sale proceeds plus interest thereon in accordance with the Court of Appeals decision.

DATED this _____ day of March, 1990.

BY THE COURT:

LEONARD H. RUSSON, District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 1990, I caused a true and correct copy of the foregoing to be delivered to Craig G. Adamson and Eric P. Lee, attorneys for defendant, 310 South Main, Suite 1330, Salt Lake City, UT.

JUDGEMEN.

WALTER P. FABER, JR. (A1026)
Attorney for Plaintiffs
2102 East 3300 South
Salt Lake City, UT 84109
Telephone: 486-5634

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

VIVIAN M. SCHELLER and STEVEN D. TOLLSTRUP, Plaintiffs,	2156139 4-30-90 8:00am JUDGMENT
vs.	Civil No. 830906862CV
DIXIE SIX CORPORATION, Defendant.	JUDGE LEONARD H. RUSSON

This matter came on for trial on the 21st day of November, 1989, at the hour of 10:00 o'clock a.m. The plaintiffs were represented by Walter P. Faber, Jr. and Richard M. Matheson. Defendant was represented by Craig G. Adamson and John T. Evans.

This matter was remanded to this court by the Utah Court of Appeals for the sole purpose of determining the value of the non-sale efforts of the defendant, Dixie Six, the general partner, to the plaintiffs, Scheller and Tollstrup, the limited partners, under a theory of quantum meruit outlined by the Court of Appeals n its decision. The court having reviewed the file, the decision of the Court of Appeals, the evidence submitted and the argument advanced by each of the parties at the trial after remand and having entered its findings and conclusions of law and being fully informed in the matter, and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that

Dixie Six be awarded the sum of $36,000.00 for its non-sale efforts and that Scheller and Tollstrup receive the balance of the sale proceeds plus interest thereon in accordance with the Court of Appeals decision.

DATED this 17th day of March, 1990.

BY THE COURT:

LEONARD H. RUSSON, District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 1990, I caused a true and correct copy of the foregoing to be delivered to Craig G. Adamson and Eric P. Lee, attorneys for defendant, 310 South Main, Suite 1330, Salt Lake City, UT.

gom Corp., 618 P.2d at 505. "[I]t cannot be adopted as a general precept of contract law that, whenever one party to a contract can show injury flowing from the exercise of a contract right by the other, a basis for relief will be somehow devised by the courts." *Mann*, 586 P.2d at 464.

The judgment below is reversed. The parties shall bear their own costs on appeal.

GREENWOOD and ORME, JJ., concur.

Vivian M. SCHELLER and Steven D. Tollstrup, Plaintiffs and Appellants,

v.

DIXIE SIX CORPORATION, Defendant and Respondent.

No. 860147-CA.

Court of Appeals of Utah.

April 25, 1988.

Limited partners in real estate limited partnership filed suit seeking declaratory judgment limiting general partner to recovery of its expenses plus 6% sales commission for sale of undeveloped partnership property. The Third District Court, Salt Lake County, Dean E. Conder, J., concluded that limited partners were estopped from claiming that general partner had not performed in accordance with partnership agreement, and limited partners appealed. The Court of Appeals, Orme, J., held that: (1) limited partners were not estopped by their actions from asserting that general partner did not perform as provided under agreement; (2) "develop" within meaning of partnership agreement meant build, and agreement did not contemplate sale of property without development; and (3) parties' conduct established contract implied in fact as to allocation of proceeds if property was sold prior to development, and general partner was entitled to recovery in quantum meruit for reasonable value of its non-sale efforts.

Affirmed in part, reversed and remanded in part.

1. Partnership ⇐366

Limited partners in real estate limited partnership, who contended that general partner's right to share equally in profits from sale of property was only triggered if the property was developed, were not estopped from contesting general partner's entitlement to profits upon sale of undeveloped property by virtue of their previous agreement to two minor sales of undeveloped property and to proposed sale which never took place.

2. Partnership ⇐366

"Develop," within meaning of real estate limited partnership agreement that provided that purpose of partnership was to develop property, meant build, and division of profits upon sale of property before any building had taken place could not be determined by reference to agreement.

See publication Words and Phrases for other judicial constructions and definitions.

3. Partnership ⇐366

Conduct of parties to real estate limited partnership agreement that provided that purpose of partnership was to develop property established contract implied in fact as to allocation of proceeds if property was sold prior to development, and general partner was entitled to recovery in quantum meruit for reasonable value of its non-sale efforts; limited partners requested general partner to perform work of developing property and general partner clearly expected to be compensated for such services, and limited partners knew or should have known that general partner expected compensation beyond sales commission it would receive for just selling property.

Walter P. Faber, Jr., Watkins & Faber, Salt Lake City, for plaintiffs and appellants.

Craig G. Adamson (argued), Mark A. Larsen, Lawrence K. Hurless, Dart, Adamson, and Parken, Salt Lake City, for defendant and respondent.

Before BILLINGS, GARFF, and ORME, JJ.

OPINION

ORME, Judge:

Appellants Scheller and Tollstrup appeal from a judgment awarding defendant Dixie Six Corporation what they contend is an excessive distribution pursuant to a limited partnership agreement between the parties. We reverse in part and remand.

Facts

Vivian Scheller and her son Steven Tollstrup ("Scheller"), owned approximately twenty-four acres of property in Salt Lake County which they intended to have developed to produce long-term income. In the spring of 1979, Mrs. Scheller approached Hal Larsen, an officer of Dixie Six Corporation, about working with her and her son to develop the property. On March 3, 1980, the parties formed a limited partnership known as D.S.T., Ltd., with Dixie Six as the general partner and Mrs. Scheller and her son as limited partners. Pursuant to the limited partnership agreement, Dixie Six contributed $10,000 toward the initial capital and Scheller conveyed the property to D.S.T.

The partnership agreement provided that the purpose of the partnership was to "subdivide, develop and market" the property. The words "subdivide, develop and market" were left undefined. The agreement contained a formula for the allocation of the partnership's receipts, which may be summarized as follows:

(a) First, to reimburse the actual expenses relative to the subdividing, development, improvement and sale of the property,

(b) Second, to payment to the Limited Partners for the real property, calculated at $30,000 per acre.

(c) Third, one-half of the remainder to Dixie Six and one-half of the remainder to the Limited Partners.

In addition, the agreement provided that Dixie Six could charge the partnership a real estate commission not exceeding 6% of the sales price of the property and, further, that Dixie Six had the unqualified right to sell the property at any time.

Following the signing of the agreement, Dixie Six hired Western Design, which began preparing plans, plats, and studies, and sought governmental approval to build an apartment and commercial complex on the site.

In April 1981, D.S.T. sold 1.2 acres of the property to Marvin Hendrickson, an officer and shareholder in Dixie Six, for $36,000.00 and in February 1982, D.S.T. sold an additional 0.75 acres to Hendrickson. In both transactions, D.S.T. took no sales commission or other distribution and paid all of the proceeds to Scheller.

Once the plans for improvement on the site were completed in the fall of 1982, Dixie Six attempted to get financing for the project but was unsuccessful.[1] During this time, D.S.T. received an offer from P.F. West to purchase the remaining property. Dixie Six sought Scheller's consent to the proposed sale to P.F. West and Scheller consented, but the sale was never completed. Dixie Six subsequently discontinued its efforts to locate and obtain financing. Dixie Six then caused the remaining partnership property to be sold to Busch Development on June 30, 1983, for a sum in excess of $1.2 million.

Prior to the sale of the property, Dixie Six informed Scheller that it intended to divide the proceeds from the sale according to the formula set forth in the partnership

1. Articles IV and XIV of the agreement required Dixie Six, as one of its obligations, to obtain financing.

agreement.[2] Scheller objected to allocation of the proceeds on that basis. The sale was concluded without the allocation issue having been resolved. On September 23, 1983 Scheller filed suit in district court seeking a declaratory judgment limiting Dixie Six to the recovery of its expenses plus the 6% sales commission for the sale of the property and to prohibit Dixie Six from sharing in the profit of the sale as set forth in the partnership agreement.

The trial court found that the partnership agreement did not define the words "subdivide, develop, and market" and concluded that Dixie Six did not violate the agreement by selling the property. The court also concluded that Scheller was estopped from claiming that Dixie Six had not performed in accordance with the contract because Scheller had knowledge of, and in fact acquiesced and approved of, all sales of the property. In addition, the court found that it would be inequitable to allow Scheller to accept the efforts of Dixie Six without allowing Dixie Six to recover as provided in the contract. Since the parties had expressly provided no alternative method of compensating Dixie Six for its services, the court found the formula as set forth in the partnership agreement to be enforceable.

Scheller argues that Dixie Six was not entitled to a full share of the profits from the sale of the property because it sold the property without "developing" it as required by the agreement. Scheller acknowledges that, while Dixie Six had the unqualified right to sell the property at any time, a right Scheller contends was given primarily for tax purposes, it had the obligation to "subdivide, develop and market" the property. Thus, Dixie Six's right to share in the proceeds according to the formula set forth in the agreement was contingent upon its fulfilling its obligation to "subdivide, develop and market" the property.

The trial court did not reach the issue of the meaning of the term "develop" as used in the agreement because it determined that Scheller was "estopped" from taking the position that Dixie Six had not performed as provided in the contract. We find Scheller's conduct does not constitute estoppel.

Estoppel

[1] The elements of estoppel are: "conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct." *Barnes v. Wood*, 750 P.2d 1226, 1230, (Utah Ct.App. 1988) (quoting *Blackhurst v. Transamerica Ins. Co.*, 699 P.2d 688, 691 (Utah 1985)). The trial court concluded that appellants were estopped from asserting that Dixie Six could not sell the property unless it was "developed" because Scheller had knowledge of, acquiesced in, and approved of the two minor sales of property to Marvin Hendrickson and the proposed sale to P.F. West, all without any development having taken place. However, the trial court's conclusion confuses Scheller's position concerning sale of the property with Scheller's position concerning the allocation of proceeds upon sale.

Scheller has not asserted that Dixie Six could not sell the property unless it was "developed" as anticipated under the agreement but only that Dixie Six was not entitled to a full share of the proceeds for the sale of property unless it satisfied its obligations under the contract. Scheller's approval of the first two sales of property do not constitute an estoppel from objecting to the allocation of proceeds from the Busch sale for two reasons. First, the earlier sales of property, combined, constituted only 1.95 acres out of the total 24 acres owned by D.S.T. and involved land that was never intended for development. Second, Dixie Six took no sales commissions on these transactions and paid all the proceeds to Scheller. Therefore, Scheller

2. In their complaint, Scheller also claimed that Dixie Six had demanded a commission of 19% rather than the 6% provided in the agreement.

had no reason to complain about the allocation of proceeds.

Nor can Scheller's approval of the proposed P.F. West sale form the basis of an estoppel from objecting to the allocation of proceeds from the Busch sale. The P.F. West sale was never completed and there were no proceeds to allocate. Thus, Scheller's failure to object to the allocation of proceeds from two sales in which Dixie Six took no proceeds and one proposed sale which never reached the point of allocation, is not conduct that could reasonably lead Dixie Six to believe that Scheller would not object to its claiming a full share of proceeds in the event of a consummated sale of undeveloped property. Any uncertainty in this regard was resolved when, nearly two months prior to closing of the Busch sale, Scheller's counsel wrote Dixie Six objecting to use of the agreement's formula for allocating sale proceeds if the property were sold undeveloped.

We hold that the trial court erred in concluding that Scheller was estopped by its own actions from asserting that Dixie Six did not perform as provided in the contract. Because the trial court decided the case on a theory of estoppel, it was not necessary for it to reach what we view as the pivotal issue in this case, namely the meaning of the term "develop" as used in the agreement. Since we find that Scheller's conduct did not give rise to an estoppel, the exact meaning of the term is critical.

"Subdivide, Develop and Market"

[2] Generally, the term "develop," when used in connection with real estate, is interpreted to mean "the converting of a tract of land into an area suitable for residential or business uses." *Prince George's County v. Equitable Trust Co., Inc.*, 44 Md.App. 272, 408 A.2d 737, 742 (1979). *Accord, Muirhead v. Pilot Properties, Inc.*, 258 So.2d 232, 233 (Miss.1972). Similarly, the word "developer," in common parlance, means "a person who develops real estate; *often:* one that improves and subdivides land and builds and sells residential structures thereon." Webster's Third New International Dictionary 618 (1986).

The parties' agreement states in Article II that the purpose of the partnership is to "subdivide, develop, and market" the property. The use of these terms, or some variation, throughout the agreement, is consistent with the interpretation that "develop" means to build. For example, Article VI, with our emphasis, states as follows:

> In addition thereto, Dixie shall contribute its expertise for the purpose of subdividing, developing and marketing the property; shall provide or obtain all *equipment, machinery* and personnel necessary for such subdivision, development and marketing; and shall obtain the necessary and sufficient *financing* for such subdivision, development and marketing, *using the property as security* thereof.

Viewing the contract as a whole, we would have little difficulty in concluding, as a matter of law, that the term "develop" as used in this agreement means "build." [3] Equipment, machinery, and secured lending suggest construction, not the mere planning, surveying, studying, and appraising which Dixie Six contends satisfied the obligation to "develop" the property. However, even if there is some ambiguity concerning what the parties intended when using the term "develop," the evidence compels the conclusion that the parties intended to mean "build." The formula allocating a full 50% of the net proceeds to Dixie Six is itself indicative of that result. If all Scheller anticipated was the sale of the property, it would have hired a real estate agent and paid the standard real estate commission. Common sense dictates that one does not offer someone *half* of the net profit on the sale of property for simply serving as an agent to sell property.

More importantly, the prior discussions and negotiations between the parties and their course of conduct assumed actual

3. Assuming that "develop" means "build," uncertainty remains as to what was to be built: a church, a race track, homes, a laundromat, or even roadways, curbs, and gutters? Such uncertainty is inconsequential in adjudicating the parties' rights where nothing whatever was built.

building on the property. The trial court found that Dixie Six sought government approval for "the building of an apartment and commercial complex on the site." The court also found that prior to forming the partnership, the parties met on the site of the property and "discussed possible types and configurations of buildings which might fit on the land."

The parties' agreement contemplated the development of the property and did not anticipate the sale of the property undeveloped. Accordingly, the payment formula was premised on the sale of developed property. So certain were the parties that the property would be developed that they never contemplated a formula for the allocation of proceeds in the event of a sale of undeveloped property. Thus, there was simply no agreement between the parties as to the allocation of proceeds in the event that Dixie Six failed to develop the property as required by the agreement.

Absent a meeting of the minds on how to divide the proceeds in the event of sale without development, Dixie Six has no clear contractual right to recover anything in excess of the agreed commission and expense reimbursement. Nonetheless, Scheller concedes that Dixie Six may be entitled to some sort of equitable remedy.

Quantum Meruit

The trial court, considering it had no alternative method of compensation, determined it had to either award Dixie Six no additional compensation whatsoever or a full 50% of the profit from the sale of the property. It chose the latter rather than leave Dixie Six uncompensated for its efforts. While we agree with the trial court that it would be unfair to allow Scheller to profit from the work done by Dixie Six in anticipation of development, we do not agree that the only alternative is to give Dixie Six a 50% share of the net proceeds from the sale.

When a party, for some reason, is not entitled by the express terms of a contract to recover payment for services rendered, he or she might nonetheless be entitled to recover in quantum meruit. *Davies v. Olson*, 746 P.2d 264, 268 (Utah Ct.App.1987). Recovery under quantum meruit presupposes that no enforceable contract exists. *Id.* In this case, while the parties entered into a contract, no contract existed as to the allocation of proceeds in the event the property was sold undeveloped.

Quantum meruit has two distinct branches, both rooted in justice to prevent one party's enrichment at the other's expense. *Id.* at 269. The first branch, contract implied in law or "quasi-contract," is really not a contract at all, but rather an action in restitution. *Id.* "The elements of a quasi-contract, or a contract implied in law are: (1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it." *Id.* Recovery under quasi-contract or contract implied in law is measured by the value of the benefit conferred on the defendant and not by the detriment incurred by the plaintiff or, necessarily, the reasonable value of the plaintiff's services. *Id.*

The second branch of quantum meruit, contract implied in fact, is an actual contract established by conduct. *Id.* The elements of a contract implied in fact are: (1) the defendant requested the plaintiff to perform the work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the defendant knew or should have known that the plaintiff expected compensation. *Id.* Recovery in such cases is for the amount the parties can be said to have reasonably intended as the contract price. When the parties have left that amount unexpressed, courts will infer the amount to be the reasonable value of the plaintiff's services. *Id.*

[3] The conduct of the parties in this case established a contract implied in fact as to the allocation of proceeds if the property was sold prior to development. Scheller requested Dixie Six to perform the work of developing the property which necessarily involved the work of preparing plans, plats, and studies and securing governmental approval for construction on the site. Likewise, Dixie Six clearly expected

to be compensated for these services. Finally, Scheller knew or should have known that Dixie Six expected compensation for these services beyond the 6% sales commission it would receive for just selling the property.

It is reasonably clear that, in agreeing to the payment formula prescribed in the agreement, the parties contemplated that Dixie Six's 6% commission, a standard commission rate in the real estate industry, would compensate it for its efforts in marketing the property while the 50% share in the net profits would reward it for its efforts in subdividing and developing the property. Thus, if there had been a mere sale, 6% of the selling price would represent an appropriate allocation to Dixie Six. However, while it cannot be said that Dixie Six satisfied its obligation to develop the property, the trial court nonetheless found that Dixie Six had expended efforts which enhanced the property, including acquiring plans for development of the property and obtaining governmental approval for development in accordance with the plans. As explained above, Dixie Six is entitled to a recovery in quantum meruit for the reasonable value of its non-sale efforts.

Accordingly, we affirm the judgment insofar as it awards Dixie Six the reimbursement of its expenses and a sale commission of 6%. The judgment is reversed insofar as it also allowed Dixie Six 50% of the net sale profits, with remand for a determination of the amount of additional compensation to which Dixie Six is entitled under a theory of quantum meruit. The parties shall bear their own costs of appeal.

BILLINGS and GARFF, JJ., concur.

STATE of Utah, Plaintiff and Appellant,

v.

Curtis OWENS, Defendant and Respondent.

No. 870342–CA.

Court of Appeals of Utah.

April 29, 1988.

Defendant was convicted in the Fourth District Court, George E. Ballif, J., of theft of rented property, but the court granted new trial. The State appealed. The Court of Appeals, Jackson, J., held that State could not appeal order granting new trial.

Appeal dismissed.

1. Criminal Law ⇐905

Motion for new trial generally is permitted for correcting errors made in trial court, or for reviewing conviction obtained by unfair or unlawful methods.

2. Criminal Law ⇐919(1)

Witness intimidation by prosecutor can warrant new trial if it resulted in denial of defendant's right to fair trial. U.C.A.1953, 77–35–24(a).

3. Criminal Law ⇐1024(7)

In granting a new trial, trial court did not, in substance, grant arrest of judgment, but looked beyond record to prosecutor's and witness' affidavits and found improper prosecutorial behavior warranting new trial, and State could not appeal from such order. U.C.A.1953, 77–35–26.

David L. Wilkinson, Atty. Gen., David B. Thompson, Asst. Atty. Gen., Salt Lake City, for the State.

Before JACKSON, BENCH and BILLINGS, JJ.

Craig G. Adamson (0024)
Attorney for Defendant
310 South Main, Suite 1330
Salt Lake City, Utah 84101

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

VIVIAN M. SCHELLER, et al,	:	J U D G M E N T
Plaintiffs,	:	
vs.	:	Civil No. C83-6862
DIXIE SIX CORPORATION,	:	Judge Dean E. Conder
Defendant.	:	

---oooOooo---

This matter came on for trial before the Honorable Dean E. Conder, a judge of the above-entitled court on the 10th day of May, 1985, and was concluded on the same day. Plaintiffs were represented by Walter P. Faber, their attorney of record. Defendant was represented by Craig G. Adamson, its attorney of record. Trial proceeded and the parties each provided testimony, submitted documents and made argument to the court in support of their positions. Counsel for each of the parties has also submitted memoranda as requested by the court and the court has reviewed the memoranda and the file. The court being fully advised in the matter has issued its memorandum opinion and has made and entered its Findings of Fact and Conclusions of Law.

The court now being fully advised and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED:

1. The limited partnership between the parties continues in force under its specific written terms.

2. The defendant general partner is ordered to continue to collect and to distribute the funds from the sale of the property of the partnership as provided in Article IX of the agreement of the parties with the first monies applied to payment to general partner for sums due under paragraph 9.2 and 9.3 of the agreement of the parties.

3. Plaintiffs' complaint for declaratory judgment is denied.

4. Defendant is awarded its costs herein.

DATED this 13 day of June, 1985.

BY THE COURT:

/s/
Dean E. Conder
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of July, 1985, I mailed a true and correct copy of the foregoing Judgment, first-class mail, postage prepaid, to Walter P. Faber, Attorney for Plaintiffs, at 2102 East 3300 South, Salt Lake City, Utah 84109.

_____

CERTIFICATE OF LIMITED PARTNERSHIP

OF

D. S. T., LTD.

Pursuant to the Utah Uniform Limited Partnership Act, Dixie Six Corporation, a Utah corporation, hereinafter referred to as "Dixie", VIVIAN M. SCHELLER, a woman, and STEVEN D. TOLLSTRUP, a man, hereinafter referred to collectively as "the Limited Partners", and individually by name, have formed a limited partnership and do hereby certify and state:

ARTICLE I
NAME

The name of the limited partnership is D. S. T., LTD.

ARTICLE II
PURPOSE

The purpose and character of the business of the partnership is to subdivide, develop and market certain real property located in Salt Lake County, Utah.

ARTICLE III
PRINCIPAL PLACE OF BUSINESS

The principal office of the partnership shall be at 4394 South Redwood Road, Salt Lake City, Salt Lake County, Utah. The partnership may maintain such other offices and places of business as the partners from time to time find necessary or desirable, either within or without the State of Utah.

ARTICLE IV
NAMES AND RESIDENCE OF PARTNERS

The names and residence addresses of each member of the partnership, general and limited partners being specifically designated, are as follows:

GENERAL PARTNER:

DIXIE SIX CORPORATION	4394 South Redwood Road Salt Lake City, Utah 84107

LIMITED PARTNERS:

VIVIAN M. SCHELLER	3778 East Cliff Drive Salt Lake City, Utah 84117
STEVEN D. TOLLSTRUP	

ARTICLE V
TERM

The term of the partnership shall begin as of the date of the execution of this Partnership Agreement, and shall continue until December 31, 1982, and thereafter from year to year unless terminated or dissolved as hereinafter provided.

ARTICLE VI
CONTRIBUTIONS BY PARTNERS

The Limited Partners shall sell to the partnership the real property more fully described in Exhibit "A" annexed hereto and made a part hereof, which has an agreed value of FOR USEABLE LAND THIRTY THOUSAND DOLLARS ($30,000) per acre. Dixie shall contribute to the partnership the sum of $10,000, which sum shall be paid to the Limited Partners as a down payment on the property. In addition thereto, Dixie shall contribute its expertise for the purpose of subdividing, developing and marketing the property; shall provide or obtain all equipment, machinery and personnel necessary for such subdivision, development and marketing; and shall obtain the necessary and sufficient financing for such subdivision, development and marketing, using the property as security therefor.

ARTICLE VII
ADDITIONAL CONTRIBUTIONS

The Limited Partners shall not be obligated to make any additional contributions to the partnership.

ARTICLE VIII
RETURN OF CONTRIBUTIONS

8.1. The Limited Partners shall be entitled to payment for the property upon termination of the partnership as provided in Article V or upon dissolution of the partnership as provided herein; provided, however, the Limited Partners shall not receive payment for the property until (a) all liabilities of the partnership, except liabilities to the General Partner and Limited Partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them; (b) the consent of all partners is had; and (c) the certificate is cancelled or so amended as to set forth the withdrawal or reduction.

8.2. Subject to the limitations of paragraph 8.1, the Limited Partners may rightfully demand payment for the property (a) on dissolution of the partnership, or (b) on the date specified in Article V for termination and dissolution of the partnership.

ARTICLE IX
PROFITS AND BOOKS

9.1. The first accounting period for the partnership shall be from the date of execution of this Agreement to December 31, 1980. Thereafter, the profits and losses of the partnership shall be computed annually for each period January 1 through December 31. Profits and losses shall be allocated equally as specified hereinbelow.

9.2. Receipts of the partnership shall be allocated as follows:

(a) First, to the actual expenses of the partnership or Dixie relative to the subdividing, development, improvement and sale of the property, such expenses to be itemized on a monthly statement provided to the Limited Partners.

(b) Second, to payment to the Limited Partners for the real property.

(c) Third, one-half of the remainder to Dixie and one-half of the remainder to the Limited Partners.

9.3. In calculating the actual expenses of the partnership or Dixie relative to the subdividing, development, improvement and sale of the property pursuant to paragraph 9.2(a) hereinabove, Dixie shall not apply any fixed cost or overhead expenses to the partnership project. Dixie or any of its affiliates or principals may charge the partnership a real estate brokerage commission not exceeding six percent (6%) of the sales price of the property or any portion thereof.

9.4. No salary shall be paid to any Partners. There will be established an individual drawing account to be maintained for each Partner, which shall be charged with all withdrawals made for such Partner's benefit. No drawing account shall be established for the General Partner unless and until all actual expenses of development and improvement have been paid and the Limited Partners have received payment for the real property.

9.5. An individual capital account shall be maintained for each Partner and shall be credited with all contributions made by that Partner and charged and credited in accordance with this paragraph and with paragraphs 9.1, 9.6 and 9.7 herein.

9.6. As soon as practicable after the close of each calendar year, but in no event later than three and one-half (3-1/2) months after the close of the calendar year, the drawing accounts of the Partners shall be closed to the capital accounts.

9.7. After payment of all debts and expenses of the partnership, the net cash flow of the partnership may be distributed to the Partners annually or more frequently, as determined by the General and Limited Partners. For purposes of this paragraph, net cash flow shall be deemed to mean net cash remaining in the partnership's account after

payment of all legitimate partnership expenses and withholding a reasonable reserve for contingencies. Such cash flow shall be computed without regard to profits or losses shown on the partnership's books, except as such profits or losses may affect the reserve for contingencies. Any such distributions shall be charged against the Partners' drawing accounts.

9.8. The books of the partnership shall be maintained at the principal office of the partnership and shall be open to reasonable inspection by any partner. Such books shall be kept on such accounting basis as the partnership may determine from time to time.

ARTICLE X
ADDITIONAL LIMITED PARTNERS

No additional limited partners shall be admitted to the partnership without the unanimous consent of all partners, both general and limited.

ARTICLE XII
PRIORITY OF LIMITED PARTNERS

No Limited Partner shall have priority over any other Limited Partner either as to contributions to capital or by way of income.

ARTICLE XIII
DEMAND OF PROPERTY IN RETURN FOR CONTRIBUTION

Upon termination of the partnership, no general or limited partner shall have the right to demand and receive property other than cash in return for its contribution. Upon concurrence of all the partners, both general and limited, other than the partner demanding return of his contribution, the withdrawing partner may have his contribution returned in property other than cash.

ARTICLE XIV
CONDUCT OF PARTNERSHIP

On the date hereof, the Limited Partners shall convey the property described in Exhibit "A" to the partnership by Warranty Deed. The Limited Partners shall cause such property to be graded to meet Salt Lake County standards, and shall cause all buildings and personal property located on such property to be removed therefrom. It is understood by the parties that the property shall be utilized by the partnership to obtain a loan, the proceeds thereof to be used for the subdivision, development and marketing of the property by Dixie.

ARTICLE XV
MANAGEMENT

15.1. Subject to the provisions stated in this Article, Dixie shall exercise complete control in the management of the partnership and shall devote such time to the partnership as shall be reasonably required for its welfare and success. Dixie shall obtain the necessary financing for the subdivision, development and marketing of the property. Dixie shall proceed with subdividing, developing and marketing the property as expeditiously as possible. Dixie shall do no act detrimental to the best interests of the partnership.

15.2. No Limited Partner shall participate in the management of the partnership business.

15.3. The Limited Partners hereby consent to any sale or other disposition, encumbrance, mortgage or lease by Dixie on behalf of the partnership, of any or all of the partnership assets, now or hereafter acquired, on such terms and conditions as may be determined by Dixie, and to the employment, when and if required, of such brokers, agents and attorneys as Dixie may determine, notwithstanding that any party hereto may have an interest therein; provided, however, in the event Dixie proposes to sell the property to any entity controlled by Dixie or in which Dixie or any of its principals own an interest, the sale price for the property shall be determined as follows:

Dixie shall appoint an appraiser, the Limited Partners shall appoint an appraiser, and the two appraisers thus appointed shall appoint a third appraiser. The three appraisers thus determined shall thereupon appraise the partnership property. An appraisal agreed to by at least two of the three appraisers shall be controlling.

ARTICLE XVI
DEPOSITS

All funds of the partnership shall be deposited in its name in such checking account or accounts designated by Dixie. All withdrawals therefrom shall be made upon checks signed by the authorized officers of Dixie.

ARTICLE XVII
CONVEYANCES

Any deed, bill of sale, mortgage, lease, contract of sale or other document purporting to convey or encumber the interest of the partnership in all or any portion of any real or personal property at any time held in its name, may be signed by Dixie.

ARTICLE XVIII
DISSOLUTION OF PARTNERSHIP

The partnership shall be dissolved upon the occurrence of any of the following events:

(a) The sale of all property to third parties.

(b) The bankruptcy, insolvency, receivership or involuntary dissolution of Dixie.

(c) Upon written notice by the Limited Partners, if Dixie shall fail to perform its obligations hereunder and such failure shall continue for a period of thirty (30) days after receipt of such written notice.

In the event of a dissolution as provided hereinabove, the partnership shall immediately begin to wind up its affairs. The proceeds from liquidation of partnership assets, after payment to all creditors of the partnership in the order of priority provided by law, shall be paid and applied in accordance with Article IX hereinabove.

ARTICLE XIX
GOVERNING LAW

This agreement and the rights of the parties hereunder shall be interpreted in accordance with the laws in the State of Utah.

ARTICLE XX
LIMITED LIABILITY

The liability of the Limited Partners shall be limited to contributions made to the partnership.

IN WITNESS WHEREOF, the undersigned have hereunto set their hands this 3RD day of MARCH, 1980.

GENERAL PARTNER:

DIXIE SIX CORPORATION

ATTEST:

By _____
President

LIMITED PARTNERS:

_____
Vivian M. Scheller

_____
Steven D. Tollstrup

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 3rd day of March, 1980, personally appeared before me E. Verne Breeze, who being by me duly sworn, did say that he is the President of Dixie Six Corporation, and that the foregoing Certificate of Limited Partnership was signed in behalf of said corporation by authority of a resolution of its Board of Directors and said E. Verne Breeze acknowledged to me that said corporation executed the same.

Notary Public

Residing at: Salt Lake City

My Commission Expires:
10 July 1983

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 3rd day of March, 1980, personally appeared before me VIVIAN M. SCHELLER and STEVEN D. TOLLSTRUP, who being by me first duly sworn acknowledged to me that they executed the foregoing Certificate of Limited Partnership as limited partners.

Notary Public

Residing at: Salt Lake City

My Commission Expires:
10 July 1983

MODIFICATION OF CERTIFICATE OF LIMITED PARTNERSHIP

OF

D.S.T., LTD.

This modification of the Certificate of Limited Partnership of D.S.T., LTD., made and entered into this 30th day of December, 1982, by, between and among DIXIE SIX CORPORATION, VIVIAN M. SCHELLER and STEVEN D. TOLLSTRUP, being all of the partners.

W I T N E S S E T H:

WHEREAS, a question as to the termination date of the partnership exists and the partners have entered into a verbal agreement to modify the portion of the agreement concerning termination which they wish to formalize,

NOW, THEREFORE, in consideration of the covenants and agreements hereinafter contained it is agreed as follows:

1. The Certificate of Limited Partnership is modified as follows:

ARTICLE V

TERM

The term of the partnership shall continue until June 30, 1983, unless otherwise extended by the parties hereto.

DIXIE SIX CORPORATION

By _____
President

Attest:

_____

_____
VIVIAN M. SCHELLER

_____
STEVEN D. TOLLSTRUP

MAILING CERTIFICATE

I hereby certify that on the 10th day of May, 1991, I caused a true and correct copy of the foregoing to be mailed, postage prepaid, to the following:

Walter P. Faber, Jr.
2102 East 3300 South
Salt Lake City, Utah 84109